IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

TANA CHRIS LAWRENCE,

Defendant.

3:12-cr-00538-BR
(3:16-cv-02286-BR)

OPINION AND ORDER

BILLY J. WILLIAMS
United States Attorney
CRAIG J. GABRIEL
Assistant United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204
(503) 727-1107

Attorneys for Plaintiff

PER C. OLSON
Hoevet Olson Howes, PC
1000 S.W. Broadway
Suite 1740
Portland, OR 97205
(503) 228-0497

Attorneys for Defendant

BROWN, Senior Judge.

This matter comes before the Court on Defendant Tana Chris Lawrence's Second Amended Motion (#281) Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by A Person in Federal Custody. For the reasons that follow, the Court **DENIES** Defendant's Motion and **DECLINES** to issue a Certificate of Appealability.

BACKGROUND

On October 11, 2012, Defendant Tana Chris Lawrence and Angeledith Saramaylene Smith and were charged in an Indictment with Murder in the First Degree. Specifically, the Indictment alleged on September 29, 2012, Lawrence and Smith "with malice aforethought, did unlawfully kill Faron Lynn Kalama . . . in the perpetration of, or in the attempt to perpetrate, kidnapping, aggravated sexual abuse, sexual abuse, and burglary" in violation of 18 U.S.C. §§ 1111, 1201 (a)(2), 2241(a), 2242 and Oregon Revised Statutes § 164.225.

On November 6, 2012, Lawrence and Smith were charged in a Superseding Indictment with Murder in the First Degree on the same grounds as those stated in the initial Indictment.

On October 17, 2013, Lawrence and Smith were charged in a Second Superseding Indictment with two counts of Murder in the First Degree. Count One alleged on September 29, 2012, Lawrence

and Smith

> with malice aforethought, did unlawfully kill Faron Lynn Kalama, in the perpetration of, or in the attempt to perpetrate, Burglary in the First Degree, in violation of Oregon Revised Statute 164.225, that is:
>
> > (a) In the District of Oregon . . . defendants LAWRENCE and SMITH . . . did unlawfully and knowingly enter and remain in a dwelling located at 2237 Elliot Heights, Warm Springs, Oregon, with intent to commit a crime therein, that is, Assault With A Dangerous Weapon With Intent To Do Bodily Harm, in violation of 18 U.S.C. § 113(a)(3);
>
> All in violation of 18 U.S.C. §§ 1111, 1153, 2.

Count Two alleged on September 29, 2012, Lawrence and Smith

> with malice aforethought, did unlawfully kill Faron Lynn Kalama, in the perpetration of, or in the attempt to perpetrate, kidnapping, in violation of 18 U.S.C. § 120l(a)(2), that is:
>
> > (a) In the District of Oregon . . . defendants LAWRENCE and SMITH . . . did unlawfully seize, confine, kidnap, abduct, and carry away Faron Lynn Kalama and held her for a benefit;
>
> All in violation of 18 U.S.C. §§ 1111, 1153, 2.

On November 14, 2013, Lawrence and Smith were charged in a Third Superseding Indictment with three counts of Murder in the First Degree. Count One alleges on September 29, 2012, Lawrence and Smith

> with malice aforethought, did unlawfully kill Faron Lynn Kalama, in the perpetration of, or in the attempt to perpetrate, Burglary in the First Degree, in violation of Oregon Revised Statute 164.225, that is:

> (a) In the District of Oregon . . . defendants LAWRENCE and SMITH . . . did unlawfully and knowingly enter and remain in a dwelling located at 2237 Elliot Heights, Warm Springs, Oregon, with intent to commit a crime therein, that is, Assault With A Dangerous Weapon With Intent To Do Bodily Harm, in violation of 18 U.S.C. § 113(a)(3);
>
> All in violation of 18 U.S.C. §§ 1111, 1153, 2.

Count Two alleges on September 29, 2012, "at a time separate and subsequent to the offense described in Count 1," Lawrence and Smith

> with malice aforethought, did unlawfully kill Faron Lynn Kalama, in the perpetration of, or in the attempt to perpetrate, Burglary in the First Degree, in violation of Oregon Revised Statute 164.225, that is:
>
> (a) In the District of Oregon . . . defendants LAWRENCE and SMITH . . . did unlawfully and knowingly enter and remain in a dwelling located at 2237 Elliot Heights, Warm Springs, Oregon, with intent to commit a crime therein, that is, Assault With A Dangerous Weapon With Intent To Do Bodily Harm, in violation of 18 U.S.C. § 113(a)(3);
>
> All in violation of 18 U.S.C. §§ 1111, 1153, 2.

Count Three alleges on September 29, 2012, Lawrence and Smith

> with malice aforethought, did unlawfully kill Faron Lynn Kalama, in the perpetration of, or in the attempt to perpetrate, kidnapping, in violation of 18 U.S.C. § 120l(a)(2), that is:
>
> (a) In the District of Oregon . . . defendants LAWRENCE and SMITH . . . did unlawfully seize, confine, kidnap, abduct, and carry away Faron Lynn Kalama and held her for a benefit;
>
> All in violation of 18 U.S.C. §§ 1111, 1153, 2.

On November 18, 2013, the Court held an arraignment hearing on the Third Superseding Indictment and set a briefing schedule for any motions against the Third Superseding Indictment.

On November 21, 2013, before the deadline for any motions against the Third Superseding Indictment had passed, Lawrence pled guilty to the third count of Murder in the First Degree.

On April 16, 2014, the Court held a sentencing hearing, granted the government's Motion to Dismiss Counts One and Two of the Third Superseding Indictment as to Lawrence, and sentenced Lawrence to a term of life imprisonment.

On April 17, 2014, the Court entered a Judgment.

On April 30, 2014, Lawrence filed a Notice of Appeal to the Ninth Circuit.

On January 14, 2016, the Ninth Circuit issued a Mandate affirming Lawrence's sentence and conviction.

On March 25, 2016, Lawrence filed a Petition for Writ of Certiorari to the United States Supreme Court.

On May 2, 2016, the Supreme Court denied Lawrence's Petition for Writ of Certiorari.

On December 5, 2016, Lawrence filed a *pro se* Motion (#235) Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence.

On December 12, 2016, the Court appointed counsel for Lawrence for purposes of her Motion to Vacate.

On May 1, 2017, Lawrence filed an Amended Motion (#247)

Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence on the ground of ineffective assistance of counsel.

On January 11, 2018, Lawrence filed a Second Amended Motion (#281) Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence on the ground of ineffective assistance of counsel. The Court took this matter under advisement on June 24, 2019.

STANDARDS

28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * *
>
> If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

Although "the remedy [under § 2255] is . . . comprehensive, it does not encompass all claimed errors in conviction and

sentencing. . . . Unless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack [under § 2255] has remained far more limited." *United States v. Addonizio*, 442 U.S. 178, 185 (1979).

DISCUSSION

Lawrence moves to vacate her conviction and sentence on the ground that she received ineffective assistance of counsel and asserts nineteen bases for her claim. Specifically, Lawrence alleges counsel provided ineffective assistance when he

1. failed to file a motion to dismiss the Third Superseding Indictment in order to assert that all counts of the Third Superseding Indictment failed to allege an offense;
2. recommended "Lawrence plead guilty to Count Three under the terms outlined in her plea agreement . . . because Count Three, as alleged in the Third Superseding Indictment, failed to allege an offense";
3. advised Lawrence "to plead guilty, without advising her that, if she were to go to trial, evidence of intoxication, mental illness, and intellectual disability would be admissible as to defendant's intent to commit the crimes alleged";
4. "failed to move for an arrest of judgment under Federal

Rules of Criminal Procedure . . . 34, after the change of plea, asserting that the case should be dismissed because Count Three failed to state an offense";

5. advised Lawrence "to plead guilty pursuant to a plea agreement in which the government could ask for no more than 35 years of imprisonment without adequately advising [Lawrence] of the risk that the court would impose a sentence of life imprisonment";
6. failed to negotiate a plea agreement in which Lawrence would not have to waive her right to an appeal in the event the Court imposed a sentence of life imprisonment;
7. "failed to negotiate a plea agreement under Federal Rules of Criminal Procedure, Rule 11(c)(1)(C), that would have bound the court to impose a sentence within a term of years and less than life imprisonment";
8. "failed to object to the government's breach of the plea agreement at sentencing when it compared . . . Lawrence's case unfavorably with other cases in the District of Oregon, described . . . Lawrence's conduct as worse than that of other defendants in the district, and made other statements that contradicted its promise and obligation to sincerely argue for imposition of no more than 35 years' imprisonment";

9. failed to consider the possibility that the Court would impose a sentence above the maximum term recommended by the government;

10. "failed to object to the government presenting partial sentencing information about other cases in the District of Oregon, failed to request more information about those cases, failed to request more time to address those cases, and failed to adequately address those cases at sentencing";

11. "failed to object to the Court's separate request for sentencing materials from other cases in the District of Oregon";

12. "failed to object to the Court's reliance on its own memory and recollection of other Murder in the First Degree cases and sentences imposed in the district in support of the court's assertion that [Lawence's] case was not sufficiently similar to those other cases to justify a sentence of less than life imprisonment";

13. "failed to obtain and present to the Court . . . sentencing data that would have provided the Court with a meaningful basis of comparison when the Court was determining what sentence to impose";

14. "[w]hen, at sentencing, the Court's statements made it plain that the Court considered defendants' conduct

worse than that of others convicted of First Degree Murder in the District of Oregon, defense counsel failed to move for a continuance on the basis that the defense had not had a fair or meaningful opportunity to understand, evaluate, and present information about those cases";

15. "failed to assert on appeal that the sentence of life imprisonment was substantively unreasonable";
16. conceded "on appeal that the failure to object to the prosecution's breach of the plea agreement at the sentencing hearing resulted in the application of the 'plain error' standard of review on appeal of whether the government breached the plea agreement";
17. failed to argue on appeal that "the government's breach of a plea agreement warranted remand for re-sentencing before a different judge";
18. failed to argue on appeal that "the 'harmless error' rule did not apply to the law of contractual plea agreements"; and
19. "[t]o the extent that this Court were to conclude that the constitutional deprivations viewed individually were harmless, not prejudicial, or otherwise not warranting relief, it must conclude that the cumulative effect of the multiplicity of errors (in any

combination) does."

The government asserts the Court should deny Lawrence's Motion in its entirety.

I. Standards

The Supreme Court has established a two-part test to determine whether a defendant has received constitutionally deficient assistance of counsel. *Premo v. Moore*, 131 S. Ct. 733, 739 (2011). *See also Strickland v. Washington*, 466 U.S. 668, 678, 687 (1984). Under this test a defendant must not only prove counsel's assistance was deficient, but also that the deficient performance prejudiced the defense. *Premo*, 131 S. Ct. at 739. *See also Sexton v. Cozner,* 679 F.3d 1150, 1159 (9th Cir. 2012); *Ben-Sholom v. Ayers*, 674 F.3d 1095, 1100 (9th Cir. 2012).

"To prove deficiency of performance, the defendant must show counsel made errors so serious that performance fell below an objective standard of reasonableness under prevailing professional norms." *Mak v. Blodgett*, 970 F.2d 614, 618 (9th Cir. 1992)(citing *Strickland*, 466 U.S. at 687-88)). *See also Sexton*, 679 F.3d at 1159 (citing *Premo*, 131 S. Ct. at 739). The court must inquire "whether counsel's assistance was reasonable considering all the circumstances" at the time of the assistance. *Strickland*, 466 U.S. at 688. *See also Detrich v. Ryan*, 677 F.3d 958, 973 (9th Cir. 2012). There is a strong presumption that counsel's assistance was adequate. *Strickland,* 466 U.S. at 689.

See also Sexton, 679 F.3d at 1159.

To prove prejudice "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. *See also Sexton*, 679 F.3d at 1159-60. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695. *See also Sexton*, 679 F.3d at 1160.

The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." *Strickland,* 466 U.S. at 697. *See also Heishman v. Ayers*, 621 F.3d 1030, 1036 (9th Cir. 2010). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland,* 466 U.S. at 697. *See also Heishman*, 621 F.3d at 1036.

DISCUSSION

As noted, Lawrence alleges 19 bases for her claim of ineffective assistance of counsel.

I. Ineffective Assistance Claims Based on the Indictments

As noted, Lawrence alleges trial counsel[1] provided

[1] Lawrence was represented by Thomas Coan at all times through her appeal.

ineffective assistance when he failed to file a motion to dismiss the Third Superseding Indictment on the ground that none of the counts alleged an offense. Specifically, Lawrence asserts:

> The Third Superseding Indictment failed to state an offense because it relied on improper predicates in each of the three counts of Felony Murder under 18 U.S.C. § 1111(a). Counts One and Two alleged that the death of Ms. Kalama occurred in the perpetration or attempted perpetration of Burglary in the First Degree, as defined by the Oregon statute, ORS 164.225. Count Three alleged that the death occurred in the perpetration or attempted perpetration of kidnapping, as defined by 18 U.S.C. § 1201(a)(2). But by including "burglary" and "kidnapping" in the list of predicate crimes in the Felony Murder statute, Congress did not intend to incorporate varied and inconsistent statutory definitions of these crimes, and instead intended uniform generic definitions.

Def.'s Mem. in Support of Second Am. Mot. to Vacate at 30-31.

A. Oregon Revised Statutes § 164.225 as a Predicate to Felony Murder

In Counts One and Two of the Third Superseding Indictment the government alleged Lawrence and Smith "with malice aforethought, did unlawfully kill Faron Lynn Kalama, in the perpetration of, or in the attempt to perpetrate, Burglary in the First Degree, in violation of Oregon Revised Statute 164.225." Lawrence asserts counsel provided ineffective assistance when they failed to assert Oregon's burglary statute is not a predicate felony that can support a conviction for felony murder under § 1111(a).

The government asserts defense counsel was not

ineffective for failing to assert Oregon's burglary statute was not a predicate felony that could support a conviction for felony murder because it was not until nearly three years after the government filed the Third Superseding Indictment that the Ninth Circuit held state burglary statutes could be too broad to support burglary as a predicate to federal felony murder. *See United States v. Reza-Ramos*, 816 F.3d 1110 (9th Cir. 2016).

The Ninth Circuit has made clear that counsel are not ineffective for failing to anticipate a decision in a later case. *See, e.g., Styers v. Schriro*, 547 F.3d 1026, 1032 (9th Cir. 2008) ("Styers relies almost exclusively on our decision in *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005). . . . However, *Daniels* was issued almost fifteen years after Styers' voir dire proceedings. . . . As such, Styers cannot rest his ineffective assistance of counsel claim on *Daniels*."); *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994)(holding an attorney is not ineffective for failing to anticipate a decision in a later case).

Because the Ninth Circuit did not hold until three years after the government filed the Third Superseding Indictment that state burglary statutes could be too broad to support burglary as a predicate to federal felony murder, the Court concludes defense counsel's performance did not fall below an objective standard of reasonableness under the then-existing

prevailing professional norms when they failed to challenge the Third Superseding Indictment on the ground that Oregon's burglary statute is too broad to be a predicate felony that can support a conviction for felony murder under § 1111(a). Accordingly, the Court concludes defense counsel was not ineffective when he failed to challenge the Third Superseding Indictment on that ground.

B. Kidnapping under 18 U.S.C. § 1201 as a Predicate to Felony Murder

Lawrence also asserts her counsel was ineffective when he failed to file a motion to dismiss Count Three of the Third Superseding Indictment on the ground that the federal kidnapping statute, 18 U.S.C. § 1201(a)(2), is not a predicate felony that can support a conviction for Felony Murder under 18 U.S.C. § 1111(a). Specifically, Lawrence contends although Congress added kidnapping to the list of predicate crimes in the Felony Murder statute, 18 U.S.C. § 1111(a), that list does not reference 18 U.S.C. § 1201. According to Lawrence, therefore, Congress intended only generic kidnapping to qualify as a predicate felony to support a charge of felony murder. Lawrence notes the Ninth Circuit has concluded "the generic definition of kidnapping encompasses, at a minimum, the concept of a 'nefarious purpose[]' motivating restriction of the victim's liberty." *United States v. Gonzalez-Perez*, 472 F.3d 1158, 1161 (9th Cir. 2007). Federal

kidnapping under § 1201, however, only requires the kidnapping to be "for a benefit." Lawrence asserts because the Third Superseding Indictment alleged only § 1201 as the predicate offense for the charge of felony murder and, therefore, it alleged only that Lawrence and Smith kidnapped Kalama "for a benefit," the Third Superseding Indictment failed to allege an offense. According to Lawrence, therefore, defense counsel was ineffective when they failed to move to dismiss the Third Count on this basis.

The government, however, asserts there was not any authority that indicated kidnapping under § 1201 could not serve as a predicate offense to felony murder at the time of the Third Superseding Indictment. Moreover, the government asserts Lawrence could not have established prejudice in any event because if defense counsel had moved to dismiss the Third Count on that basis, the government would have amended the Third Superseding Indictment to allege nefarious purpose, which is supported by the evidence.

The Court concludes it was not entirely clear in 2013 whether kidnapping under § 1201 could serve as a predicate offense to felony murder. The Court, however, concludes Lawrence has not established "there is a reasonable probability that, but for counsel's [alleged] error[], the result of the proceeding would have been different." As noted, the government has made

clear that if defense counsel had moved to dismiss the Third Court on the ground that § 1201 could not serve as a predicate offense to felony murder, the government would have amended the Third Superseding Indictment to allege generic kidnapping as the predicate offense and to allege a "nefarious purpose" for the kidnapping. In addition, based on the record before the Court at the time of the Third Superseding Indictment, the Court would have concluded the facts supported an allegation of nefarious purpose.

Accordingly, the Court concludes defense counsel was not ineffective when he failed to challenge the Third Superseding Indictment on the ground that § 1201 could not serve as a predicate offense to felony murder.

II. Ineffective Assistance Claims Based on the Plea Agreement

Lawrence alleges a number of ineffective-assistance claims based on defense counsel's performance during the plea-agreement process. Specifically, Lawrence alleges defense counsel was ineffective when he:

1. recommended Lawrence "plead guilty to Count Three under the terms outlined in her plea agreement . . . because Count Three, as alleged in the Third Superseding Indictment, failed to allege an offense";
2. advised Lawrence "to plead guilty, without advising her that, if she were to go to trial, evidence of

intoxication, mental illness, and intellectual disability would be admissible as to [Lawrence's] intent to commit the crimes alleged"

2. "failed to move for an arrest of judgment under Federal Rules of Criminal Procedure . . . 34, after the change of plea, asserting that the case should be dismissed because Count Three failed to state an offense";
3. advised Lawrence "to plead guilty pursuant to a plea agreement in which the government could ask for no more than 35 years of imprisonment without adequately understanding or advising [Lawrence] of the risk that the court would impose a sentence of life imprisonment";
4. failed to negotiate a plea agreement in which Lawrence would not have to waive her right to an appeal in the event the Court imposed a sentence of life imprisonment; and
5. "failed to negotiate a plea agreement under Federal Rules of Criminal Procedure, Rule 11(c)(1)(C), that would have bound . . . Lawrence's guilty plea to an agreement by the Court to impose a sentence within a term of years, as opposed to life imprisonment."

A. Background

On November 21, 2013, Lawrence pled guilty to Count

Three of the Third Superseding Indictment. Under the Plea Agreement the government agreed to dismiss Counts One and Two of the Third Superseding Indictment against Lawrence; to recommend a three-level downward adjustment for acceptance of responsibility under United States Sentencing Guideline (U.S.S.G.) § 3E1.1; to file a motion for a U.S.S.G. § 5K1.1[2] downward departure based on Lawrence's cooperation; and to recommend "a sentence of no longer than 35 years (420 months) in prison." Lawrence agreed not to ask the Court to impose a sentence of less than 25 years, waived her right to appeal her conviction and sentence on any grounds "except for a claim that the sentence imposed exceed[ed] the statutory maximum," and waived her right to file a collateral attack on her sentence on any ground other than ineffective assistance of counsel. Both parties agreed the Plea Agreement was made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), and, therefore, the sentencing "recommendation[s] or request[s] [did] not bind the court."

The Plea Petition signed by Lawrence noted

> although the judge will consider the recommendations and agreements of both the prosecution and defense attorneys concerning sentencing, the judge is not obligated to follow those recommendations or agreements. If the judge imposes a sentence different

[2] U.S.S.G. § 5K1.1 provides: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

> from what I expected to receive under the terms of my Plea Agreement with the prosecutor, I do not have a right to withdraw my plea.

Plea Pet. (Docket #127) at ¶ 9. The Plea Petition also noted the maximum sentence

> that can be imposed upon me for the crime(s) to which I am pleading guilty is life imprisonment.
>
> * * *
>
> My attorney has discussed with me the Federal Sentencing Guidelines. I understand that the Federal Sentencing Guidelines are advisory, not mandatory. I also know the sentencing judge, in determining the sentence to be imposed, must consider those factors set forth in Title 18, United States Code, Section 3553(a), including, but not limited to: the nature and circumstances of the offense, my own history and characteristics, the goals of sentencing (punishment, deterrence, protection, and rehabilitation), and the advisory sentencing range established by the Sentencing Guidelines. I understand the judge is charged with deciding a reasonable sentence based on the totality of circumstances, and the Federal Sentencing Guidelines are one of the factors the judge must consider in determining a reasonable sentence, and that there is no guarantee that my sentence will be within the guideline range. If my attorney or any other person has calculated a guideline range for me, I know that this is only a prediction and that it is the judge who makes the final decision as to what the guideline range is and what sentence will be imposed. I also know that a judge may not impose a sentence greater than the maximum sentence referred to in paragraph (10) above.

Plea Pet. at ¶ 13.

At the November 21, 2013, change-of-plea hearing Lawrence advised the Court that she had spent enough time with her attorney to understand the nature and seriousness of the charge against her, to understand the evidence the government had to support the charges, and to discuss her options including her right to go to trial. The Court also engaged in the following discussion with Lawrence:

> THE COURT: Well, then we're going to go over it right now. Okay? It's okay. This is really important, and I want to be sure, Ms. Lawrence, that you're not rushed into anything, and that you really know what we're talking about. So take a look at that letter called Plea Offer. Do you see it?
>
> THE DEFENDANT: Yes.
>
> * * *
>
> THE COURT: Okay. It's a contract. It's a binding agreement between you and the prosecutor. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: I am not part of the agreement. I am not allowed to make you any promises or to enter into any negotiations. So the deal is between you and the Government, but not the Court. Do you understand?
>
> THE DEFENDANT: Yes.
>
> * * *
>
> THE COURT: It -- this agreement says you agree to plead guilty to Count 3 of the Superseding Indictment that charges Murder in the First Degree. And, in exchange, the prosecutor is going to

dismiss all of the other charges brought against you. In the first indictment, in the second one, and the other charges in the third indictment. So you would end up with one charge, a serious one, Murder in First Degree, but none other. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Okay. He explained what the maximum penalties were for murder in the First Degree. Life in prison is the mandatory sentence, meaning a judge normally must impose life unless, as in this case, there's an agreement between the parties for the Government to ask for a reduction based on cooperation. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: I'm going to put it another way. If the Government did not ask me, based on your expected cooperation, to sentence you below life, if the Government didn't open that door, I wouldn't have the power to sentence you to anything but life, if convicted of this charge. Do you understand that?

THE DEFENDANT: Yes, I do.

* * *

THE COURT: This agreement allows you to ask for a sentence of no less than 25 years. To argue to me, through Mr. Coan, that 25 years is enough of a sentence for you in this circumstance. But you're not allowed to ask for anything less than 25 years, under this agreement. Do you understand?

THE DEFENDANT: Yes, I do.

THE COURT: At the same time, the Government's not allowed to ask for any more than 35

years. Do you understand?

THE DEFENDANT: Yes.

* * *

THE COURT: So, in theory, I don't have to sentence you higher than 25 months. In theory, I could sentence you lower. In theory, I could sentence you above 35 years, up to life. I don't know what the sentence will be. I need you to really understand, though, that there isn't any promise being made to you by me what your sentence is going to be. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And specifically you won't be free to take back your guilty plea if you don't like the sentence I impose. You're bound by it. Do you understand?

THE DEFENDANT: Yes, I do.

THE COURT: You're not only bound to it in this court, you're giving up your right to appeal to a higher court the fact that I'm allowing you to plead guilty and the sentence I impose. Do you understand?

THE DEFENDANT: Yes, I do.

Def.'s Second Am. Mot. to Vacate, Ex. 204 at 24-28. The Court found Lawrence was fully competent; was making a "a knowing, intelligent, and voluntary waiver of [her] rights"; and her guilty plea was "knowing, intelligent, and voluntary." *Id.* at 46. The Court also found there was a sufficient "factual basis for a finding of guilt . . . beyond any reasonable doubt" as to the charge of Murder in the First Degree as alleged in Count 3 of

the Third Superseding Indictment. *Id.*

B. Standards

"Defendants' . . . Sixth Amendment right to counsel . . . extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162 (2012)(citation omitted). *See also Padilla v. Ky.*, 559 U.S. 356, 364 (2010)(same). Accordingly, "[d]uring plea negotiations defendants are 'entitled to the effective assistance of competent counsel.'" *Lafler*, 566 U.S. at 162 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

"In *Hill*, the Court held 'the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.'" *Lafler,* 566 U.S. at 162 (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). In *Missouri v. Frye* the Supreme Court made clear that "the standard laid out in *Hill*" continues to apply when a defendant asserts ineffective assistance of counsel at the plea stage "led him to accept a plea offer as opposed to proceeding to trial." 566 U.S. 134, 147 (2012). *See also Lafler*, 566 U.S. at 162-63 (contrasts facts in *Lafler* to circumstances in *Hill* in which ineffective assistance of counsel led the defendant to plead guilty rather than to proceed to trial). Thus, when evaluating a claim of ineffective assistance of counsel based on an allegation that counsel's ineffective performance led the defendant to plead guilty rather than to proceed to trial, the Court must determine whether the

defendant has shown "'there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.'" *Lafler*, 566 U.S. at 162 (quoting *Hill*, 474 U.S. at 59).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695. *See also Smith v. Almada*, 640 F.3d 931, 940 (9th Cir. 2011). In addition, the test to determine the validity of a guilty plea remains "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill*, 474 U.S. at 56. *See also Mahoney*, 611 F.3d at 988.

C. Failures Related to Sufficiency of the Indictment

As noted, Lawrence asserts defense counsel was ineffective when he "failed to move for an arrest of judgment under Federal Rules of Criminal Procedure . . . 34, after the change of plea, asserting that the case should be dismissed because Count Three failed to state an offense" and when he recommended Lawrence plead guilty to Count Three "because Count Three, as alleged in the Third Superseding Indictment, failed to allege an offense."

The Court has already concluded defense counsel was not ineffective when he failed to move to dismiss the Third Superseding Indictment on the ground that it failed to allege an

offense. For the same reasons, the Court concludes defense counsel was not ineffective when he failed to move for an arrest of judgment under Rule 34 or when they recommended Lawrence plead guilty to Count Three of the Third Superseding Indictment.

D. Failure to Advise of the Loss of Potential Defenses to Intent

Lawrence asserts defense counsel provided ineffective assistance when he advised her "to plead guilty, without advising her that, if she were to go to trial, evidence of intoxication, mental illness, and intellectual disability would be admissible as to her intent to commit the crimes alleged." Lawrence, however, does not identify any facts to support her assertion that defense counsel failed to explore a diminished-capacity defense or that he failed to advise Lawrence that she was losing the ability to assert such a defense by pleading guilty. Specifically, the record reflects defense counsel was aware of Lawrence's mental limitations early in this case and knew Lawrence had been drinking alcohol on the night of the murder. For example, the record reflects defense counsel ordered psychological evaluations of Lawrence in December 2012 and in October 2013, and these evaluations established Lawrence had a borderline IQ and "coping deficits." At sentencing defense counsel argued comprehensively about Lawrence's limitations and asserted they warranted a sentence less than life. There is not any indication in the record that defense counsel failed to

appreciate Lawrence's limitations or to understand that they could be mitigating evidence in the event this matter went to trial. In addition, Lawrence affirmed at the change-of-plea hearing that she had thoroughly discussed her possible trial defenses with counsel and understood she was giving up those possible defenses by not going to trial.

Finally, it is questionable whether Lawrence could have established she was so intoxicated or that her limitations were so severe on the night of the crime that she "lacked the ability to attain the culpable state of mind which defines the crime." *United States v. Twine*, 853 F.2d 676, 678 (9th Cir. 1988) ("Diminished capacity is directly concerned with whether the defendant possessed the ability to attain the culpable state of mind which defines the crime."). *See also United States v. Christian*, 749 F.3d 806, 815 (9th Cir. 2014)(same). The record includes several facts that indicate Lawrence possessed the ability to attain the specific intent for both the kidnapping and the burglary predicate crimes. For example, the record reflects Lawrence planned to attack Kalama, carried lethal weapons to the scene for use during the attack, expressed worry during the attack that Kalama would contact the police, attempted to eliminate evidence after Kalama's death, and expressed regret immediately after the murder. In addition, Lawrence was able to provide a detailed account of the crime and to recall where the

victim's body was located despite drinking alcohol and having a borderline IQ.

The Court concludes on this record that Lawrence has not established she was prejudiced by defense counsel's advice to plead guilty.

E. Failures of Plea Negotiation

Lawrence asserts defense counsel made several errors when he negotiated the Plea Agreement. Specifically, Lawrence asserts defense counsel provided ineffective assistance of counsel when he advised Lawrence "to plead guilty pursuant to a plea agreement in which the government could ask for no more than 35 years of imprisonment without adequately advising [Lawrence] of the risk that the court would impose a sentence of life imprisonment"; failed to negotiate a plea agreement in which Lawrence would not have to waive her right to an appeal in the event the Court imposed a sentence of life imprisonment; and/or "failed to negotiate a plea agreement under Federal Rules of Criminal Procedure, Rule 11(c)(1)(C), that would have bound the court to impose a sentence within a term of years and less than life imprisonment."

1. Adequate Understanding of Risk of Life Imprisonment

As noted, Lawrence asserts defense counsel provided ineffective assistance of counsel when he advised her

"to plead guilty pursuant to a plea agreement in which the government could ask for no more than 35 years of imprisonment without adequately understanding or advising [Lawrence] of the risk that the court would impose a sentence of life imprisonment."

Even if defense counsel failed to understand or to advise Lawrence of the risk that the Court could impose a life sentence, which is questionable, the record reflects Lawrence was adequately advised of this risk both in the language of the Plea Agreement and by the Court. As noted, the Plea Agreement provided "although the judge will consider the recommendations and agreements of both the prosecution and defense attorneys concerning sentencing, the judge is not obligated to follow those recommendations or agreements" and that the maximum sentence "that can be imposed upon me for the crime(s) to which I am pleading guilty is life imprisonment." In addition, the Court was very clear at Lawrence's plea hearing about the fact that the maximum sentence for the crime to which Lawrence pled guilty was life imprisonment and that the Court did not have to follow the Plea Agreement. As noted, the Court advised Lawrence:

> So, in theory, I don't have to sentence you higher than 25 months. In theory, I could sentence you lower. In theory, I could sentence you above 35 years, up to life. I don't know what the sentence will be. I need you to really understand, though, that there isn't any promise being made to you by me what your sentence is going to be.

Def.'s Second Am. Mot. to Vacate, Ex. 204 at 28. Lawrence indicated she understood the crime to which she was pleading guilty had a maximum sentence of life imprisonment, that the Court did not have to follow the Plea Agreement, and that she was not guaranteed any particular sentence. Thus, even if defense counsel did not adequately understand or advise Lawrence that there was a risk that the Court could impose a sentence of life imprisonment, Lawrence has not established she was prejudiced by counsel's failure because Lawrence was thoroughly advised by the Court and by the terms of the Plea Agreement that the Court was not bound by its terms and that the Court could impose a life sentence.

Accordingly, the Court concludes defense counsel was not ineffective when he advised Lawrence to plead guilty even if he failed to advise Lawrence "of the risk that the court would impose a sentence of life imprisonment."

2. Plea Negotiations

Lawrence alleges she received ineffective assistance of counsel when he failed to negotiate a plea agreement in which Lawrence "would not have to waive her right to an appeal in the event the Court imposed a sentence of life imprisonment" and/or "failed to negotiate a plea agreement under Federal Rules of Criminal Procedure, Rule 11(c)(1)(C), that would have bound the court to impose a sentence within a term of years

and less than life imprisonment."

The Supreme Court has made clear that "defendants have 'no right to be offered a plea . . . nor a federal right that the judge accept it.'" *Lafler*, 566 U.S. at 168 (quoting *Frye*, 566 U.S. at 148). Defense counsel, therefore, was not required to negotiate a plea, to negotiate specific plea terms, or to negotiate a specific kind of plea. In addition, appellate waivers are regularly included in plea deals and "are supported by public policy considerations." *United States v. Lopez Sanchez*, No. 2:14-CR-00245-KJM, 2018 WL 1305730, at *3 (E.D. Cal. Mar. 13, 2018)(citing *United States v. Littlefield*, 105 F.3d 527, 530 (9th Cir. 1997)("We have repeatedly noted that public policy strongly supports plea agreements that include an appeal waiver.")). In addition, according to the government, the appeal waiver "formed an integral part of the *quid pro quo* that provided Lawrence [with] substantial benefits"; *i.e.*, the government's agreement to move for a sentence less than life imprisonment and to drop Counts One and Two of the Third Superseding Indictment. The government notes in its Response to Lawrence's Motion that if defense counsel had "sought an appellate waiver more favorable to Lawrence or a plea under Rule 11(c)(1)(C), Lawrence likely would have received a less favorable plea deal."

On this record the Court finds defense counsel's failure to negotiate a plea agreement in which Lawrence did not

have to waive her right to appeal in the event the Court imposed a sentence of life imprisonment and/or a plea agreement under Rule 11(c)(1)(C) did not fall "below an objective standard of reasonableness." Accordingly, the Court concludes defense counsel was not ineffective when he failed to negotiate such a plea agreement.

III. Ineffective Assistance Claims Based on Sentencing

Lawrence asserts defense counsel committed numerous errors at sentencing. Specifically, Lawrence asserts defense counsel erred when he:

8. "failed to object to the government's breach of the plea agreement at sentencing when it compared . . . Lawrence's case unfavorably with other cases in the District of Oregon, described . . . Lawrence's conduct as worse than that of other defendants in the district, and made other statements that contradicted its promise and obligation to sincerely argue for imposition of no more than 35 years' imprisonment";
9. failed to consider the possibility that the Court would impose a sentence above the maximum term recommended by the government;
10. "failed to object to the government presenting partial sentencing information about other cases in the District of Oregon, failed to request more information

about those cases, failed to request more time to address those cases, and failed to adequately address those cases at sentencing";

11. "failed to object to the Court's separate request for sentencing materials from other cases in the District of Oregon";
12. "failed to object to the Court's reliance on its own memory and recollection of other Murder in the First Degree cases and sentences imposed in the district in support of the court's assertion that [Lawence's] case was not sufficiently similar to those other cases to justify a sentence of less than life imprisonment";
13. "failed to obtain and present to the Court . . . sentencing data that would have provided the Court with a meaningful basis of comparison when the Court was determining what sentence to impose"; and
14. "[w]hen, at sentencing, the Court's statements made it plain that the Court considered defendants' conduct worse than that of others convicted of First Degree Murder in the District of Oregon, defense counsel failed to move for a continuance on the basis that the defense had not had a fair or meaningful opportunity to understand, evaluate, and present information about those cases."

A. Background

On March 12, 2014, the Probation Office prepared a Presentence Report (PSR) in which it recommended the Court to impose the maximum sentence the government could seek under the terms of the Plea Agreement (420 months) and suggested the "brutal torture" employed in the crime indicated the Court should not grant a variance.

On April 9, 2014, the government filed a Sentencing Memorandum in which it recommended the Court sentence Lawrence to 384 months imprisonment. The government noted the egregious facts of the crime and the seriousness of Lawrence's offense, but the government also noted factors that mitigated a life sentence including Lawrence's cooperation, her "truly tragic childhood," her "multiple mental health issues," and her "very low IQ." Gov.'s Sentencing Mem. at 7. The government also identified a number of cases involving first-degree murder on the Warm Springs Reservation that did not result in life sentences.

On April 15, 2014, the Court notified the parties that it had requested the Probation Officer to prepare a report listing cases within the District of Oregon in which the court had imposed life sentences. On April 15, 2014, the Probation Office provided to the Court and the parties a memorandum detailing cases in which the court as a whole had imposed life sentences and cases in which the court had merely imposed lengthy

sentences.

On April 16, 2014, the Court held a sentencing hearing for Lawrence and Smith. Lawrence, Smith, and the government requested the Court to hear a sentencing presentation on behalf of Lawrence without the presence of Smith and then a separate proceeding on behalf of Smith without the presence of Lawrence. The Court approved the parties' request. Accordingly, counsel for Lawrence and Smith made separate sentencing presentations with only the pertinent defendant present, and the government made separate presentations for Lawrence and Smith as well. At the conclusion of all of the presentations the Court sentenced Lawrence and Smith.

During the government's presentation related to Lawrence's sentence AUSA Craig Gabriel advised the Court that the government was moving for a one-level departure under U.S.S.G. § 5K1.1 for Lawrence's substantial assistance and set out the factual bases for the government's recommendation. AUSA Gabriel then reiterated that the government "stand[s] by the plea agreement" and requested a 32-year sentence for Lawrence. Def.'s Second Am. Mot. to Vacate, Ex. 209 at 82. The Court inquired whether AUSA Gabriel would like to "speak to any comparators specifically." *Id.* AUSA Gabriel indicated he wanted to address comparators, and the Court and AUSA Gabriel then engaged in the following exchange:

MR. GABRIEL: Yes, your Honor. I -- first, with respect to the prior sentences imposed for Murder in the First Degree, I think a sentence of 32 years for Ms. Lawrence falls within the heartland, to use language we used to use, of those cases.

We've had cases that have resolved for 30 years. Cases that have resolved for 35 years, where there were two deaths. A case that resolved for 40 years.

But Ms. Lawrence's behavior was -- it was just more heinous. It was more horrific.

THE COURT: None of those cases involved prolonged torture.

MR. GABRIEL: Right.

THE COURT: And what might be called conduct that would qualify for aggravated murder analysis under state law. Conduct in the course of the commission of multiple felony crimes over many hours and on a repeated basis. So this case does seem to stand apart from the others, the other murder cases.

MR. GABRIEL: It does. Mr. Williams and I were speaking this morning. We went to the Oregon state code. It's not a relevant factor under 3553(a), but this is probably an ag murder case in state court because there was an intent to torture and maim the victim here.

THE COURT: And if it was a state prosecution, the state of Oregon, if it had jurisdiction, would have the option to seek the death penalty for such a case?

MR. GABRIEL: Correct. If the defendants had been convicted of aggravated murder, the state court judge or the jury would have had three options: Death, life - true life, without parole, or life with the

possibility of parole after 30 years, day for day.

THE COURT: And so my point, with respect to the reference to the other murder cases . . . all having sentences that you say I should match in that range, involve conduct that was not as egregious, as brutal, or as prolonged as the defendant and Ms. Smith engaged in. So I'm skeptical about the argument that the sentence you're recommending is comparable, because I'm concerned . . . this case really doesn't have a comparator. And, therefore, the Court's duty to avoid unwarranted disparity is an academic one because there really has not been anything reasonably comparable that I know of. Am I missing something there on the facts?

MR. GABRIEL: I don't believe you're missing anything on the facts of what happened that day. This is -- at least in the last 14 years -- the worst murder that has come . . . to federal jurisdiction.

THE COURT: So if it's the worst of the worst, and appreciating you have a contractual obligation not to argue for more than 35 years, or 32 years, I'm still questioning the validity of your argument that the sentence you're recommending is appropriate in part because it is comparable to the other sentences, because I don't think it is.

* * *

So do you want to comment on the other cases that the Probation Office brought to my attention, where life sentences were imposed and nobody died? Life sentences were imposed in cases of aggravated child pornography, in cases of violent bank robbery, nobody died, and yet life sentences were imposed?

MR. GABRIEL: Your Honor, I will comment on those briefly. The facts in those cases speak for themselves. Nobody died.

The criminal history of some of these defendants[, however,] was much worse than the criminal history of these defendants.

* * *

And then with respect to the child exploitation cases, in those cases, even though somebody may not have died, those cases addressed prolific child pornography producers, who were habitual offenders. And the social science does say that the recidivism rate for sex offenders such as that is so incredibly high, that they present a dangerousness for the rest of –

THE COURT: So you mentioned Congressional intent. And certainly Congress has spoken with respect to the risk to the community in those kinds of violations. But Congress also spoke in Murder in the First Degree, to say that it should be mandatory life.

MR. GABRIEL: Well, the statute does require life. But the defendants -- both defendants did provide substantial assistance, which relieves the Court from the obligation to impose life. But, obviously, it's the most -- or among the most serious crimes in the entire code. We don't dispute that.

THE COURT: Why is the sentence you're seeking sufficient, given the seriousness of the criminal behavior at issue here?

MR. GABRIEL: We believe it's sufficient with respect to Ms. Lawrence specifically because she was 20 years old at the time. And she had the childhood that . . . led her to a place where she was easily involved in

a situation; that she's taken responsibility for. She acted voluntarily, knowingly, with malice aforethought. But she was put in a situation where all of the violence that had been done to her, she in turn absolutely projected and attacked on somebody else. But we do believe that her mental illness, her traumatic childhood, including the neglect, the sexual abuse, and her low IQ are mitigating factors that may not have been present in the other cases that were presented to the Court for comparison.

THE COURT: And her voluntary intoxication, which no doubt played a part in the decision making that day?

MR. GABRIEL: Not a defense and not mitigation.

Def.'s Second Am. Mot. to Vacate, Ex. 209 at 82-87.

During the government's sentencing presentation related to Lawrence, AUSA Gabriel moved for a one-level downward departure under U.S.S.G. § 5K1.1 based on Lawrence's substantial assistance. Specifically, AUSA Gabriel and the Court engaged in the following discussion

MR. GABRIEL: Ms. Lawrence proffered early in this case. She proffered three times over the summer; in July, in August, and September, I believe. Before anybody in this case -- herself, Ms. Smith, or the two accessories -- had pleaded guilty; before the motions deadline. Even before that, Mr. Coan --

THE COURT: But we're talking eight or nine months after the event?

MR. GABRIEL: Yes. Eight or nine months after

the event. Right.

THE COURT: So early is relative.

MR. GABRIEL: It's relative. But given the case of this magnitude, it's not unusual for it to take several months for the defense to digest discovery. So there were three detailed sessions with Ms. Lawrence. She provided the Government with new facts about the case and the murder that we didn't know about. She was the first to tell us that Angeledith Smith's 12-year-old sister was present during the first two burglaries and assaults. She also told us that Angeledith Smith had shot Faron Kalama with a paintball gun, which was later corroborated by that 12-year-old sister. And there were other details that she provided us that were in fact corroborated. She volunteered some violent acts that she herself had committed in the course of the murder that we didn't know about and nobody had told us about; which, frankly, is consistent with what the Court heard from Ms. Lawrence's witnesses, that she is honest about her criminal actions. She did not minimize her involvement. She made herself available to testify against Angeledith Smith, who at that time had filed a motion to dismiss the Indictment and was on what could have been perceived as a trial footing. So that is the basis for the Government's motion under 5K1.1. We believe that the motion does apply, it's appropriate, and her assistance was substantial and helpful to the Government.

* * *

> So we stand by the plea agreement. It's under Rule 11(c)(1)(B). We believe, taking everything into account – Mr. Coan provides us the psychological reports well in advance of the plea negotiations, and we knew about this mitigation. Our office, from the very top, discussed this case at length, and we believe that a 32-year sentence is appropriate.

Def.'s Second Am. Mot. to Vacate, Ex. 209 at 78-80, 82. During his presentation as to Smith AUSA Gabriel noted:

> During the lunch break, your Honor, I spoke with Mr. Williams. Mr. Williams litigated the case of United States v. Ronald McKinley, Angelo Fuentes, and Tony Gilbert. And . . . Ronald McKinley . . . received a 480-month prison sentence, and I don't think it would be helpful -- at least at this point -- to compare the brutality of one case to the other. But that murder, in which Mr. McKinley received 40 years, Mr. Fuentes 30, and Mr. Gilbert approximately 20, was a tragic horrible murder as well. And so we stand by the statement that the murder here of Faron Kalama was the worst, but it could be conditioned with [what] was arguably the worst or among the worst because of that McKinley murder, 13, 14 years ago.

Def.'s Second Am. Mot. to Vacate, Ex. 209 at 113-14.

After the parties' presentations the Court evaluated the facts of the crime as well as the government's recommended sentence and stated:

> The Court's duty today is to impose a sentence on each of these two young women, Ms. Smith and Ms. Lawrence, who each have their own tragic stories. The requirement, as I noted earlier, is to impose a sentence that is reasonable in law, that's defined as what would be sufficient but not greater than necessary to accomplish a number of

purposes set out by statute.

* * *

[T]he legally correct starting point for guideline analysis for each of the defendants is a life sentence because that is the sentence mandated by law for Murder in the First Degree. . . . [T]he guideline is considered to be a life sentence. That's where this analysis would end but for the fact that the Government has made a motion under the Guideline 5K1.1 for a one-level departure, meaning a reduction from the guideline range of life. The motion is based on the cooperation of each of the defendants to varying degrees.

* * *

It is always up to the Government to determine whether such a motion should be made. And so I emphasize, again, that had the Government not made the motion, the Court's sentencing analysis would end with the guideline of life imprisonment. The Government having made the motion, the Court is required to consider it.

* * *

But it does not, by any means, relieve the Court of the responsibility of considering any sentence up to and including life. The parties bring to the Court a plea agreement, in each case, which authorized the advocacy that each of the parties made. And so with that advocacy and with a starting point of the guideline range, I'm required to consider a number of factors. The first is the nature and the circumstances of the offense.

* * *

[I]t is sufficient to say that the murder of Faron Kalama was the end result of many hours of extraordinary brutality each of the defendants extended to her that, in my judgment, amounts to torture. This wasn't an incidental fight in the heat of the motion. It was prolonged. It was

repetitive. Defendants would leave only to return again with one or the other taking the lead in extraordinary violence.

* * *

The nature and the circumstances of the offense could not be more serious. And so that is a factor that weighs significantly in favor of a lengthy prison term.

The Court is to consider a sentence that would reflect the seriousness of the offense, to promote respect for the law, and to provide for just punishment. . . . An offense of this egregious nature warrants very serious punishment because without serious punishment for this kind of depraved behavior, there isn't any reason to respect the law. If we are not prepared to acknowledge this conduct as among the most serious of criminal behavior, then our laws do not deserve respect.

* * *

Now, Ms. Winemiller made the point every way she could that the defendants did not start out intending to murder Ms. Kalama. They intended to beat her dirty, are the quotes. But whatever that means, it certainly does not imply anything other than brutality. They intended to beat her, and beat her they did, repeatedly. One wonders how she managed to survive as long as she did. Somewhere along the way, when there were opportunities for one or the other or both to retreat, neither did. More alcohol, more encouraging one to the other, I think, is fair to infer. And we end up with the two of these defendants and the juvenile offender and Ms. Kalama taking her last breaths in the back of a van, and then being dumped.

* * *

I'm required to consider, also, what sentences have been imposed in cases that are similar, and to avoid unwarranted disparity. Meaning, if a sentence is imposed here that is different than a sentence imposed in other cases of Murder in the

First Degree, the difference has to be justified.

So we start from first trying to analyze whether the other cases of Murder in the First Degree that have been brought to my attention, all of which arose on the Warm Springs reservation, whether they are similar to these facts; and, if so, the sentences imposed in those cases should affect the decision I make today. Unfortunately, I know a lot about several of those cases because I had the responsibility of imposing those sentences. And I do not see much similarity, other than the name of the charge. I don't see anything similar about the circumstances of this case and other Murder I sentences imposed by this Court or other judges in this district. There really isn't anything similar.

I asked for guidance from the Probation Office to determine whether there were life sentences imposed in other cases or lengthy prison sentences; again, to try to evaluate what length of a prison term would be sufficient in these circumstances. And, as has been shared with the parties, there were a number of cases identified, not one of which resulted in death but involved other kinds of circumstances. An armed career offender, so someone with a lifelong pattern of using firearms and violence. Bank robberies that involved firearms and carjackings. Pornography cases with extreme facts. So I -- I agree with Mr. Gabriel that none of those cases are particularly comparative to these circumstances.

* * *

Congress imposed a mandatory life sentence for Murder in the First Degree for a reason. That reflected the official perspective of our lawmakers that when Murder in the First Degree is committed, life ought to be the sentence. The Government permitted, through its motion, for a downward departure, the Court to consider lesser sentences. And, believe me, I have. But in good conscience, I do not agree that even the sentence recommended by the Government is sufficient here, in light of the seriousness of the conduct at issue.

* * *

> And I believe it is my duty, today, to impose a life sentence for each of the two defendants. So that will be the judgment of the Court.

Def.'s Second Am. Mot. to Vacate, Ex. 209 at 135-146.

B. Lawrence's Claim Based on the Government's Alleged Breach of the Plea Agreement at Sentencing

As noted, Lawrence asserts defense counsel erred when he failed to object to the government's breach of the Plea Agreement at sentencing.

1. The Law

"'[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.'" *United States v. Alcala-Sanchez*, 666 F.3d 571, 575 (9th Cir. 2012)(quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)). "A plea agreement is a contract, and the government is held to its literal terms." *Alcala-Sanchez*, 666 F.3d at 575 (citation omitted). "Requiring the government to strictly comply with the terms of a plea agreement encourages plea bargaining, 'an essential component of the administration of justice' because it ensures that a defendant gets the benefit of his or her bargain — the presentation of a united front to the court.'" *Id.* (quoting *Santobello*, 404 U.S. at 260). "It does not matter that a breach is inadvertent or "'that the statements or arguments the

prosecutor makes in breach of the agreement do not influence the sentencing judge.'" *Id.* (quoting *Gunn v. Ignacio*, 263 F.3d 965, 969-70 (9th Cir. 2001)).

The Ninth Circuit has made clear that the "government breaches its agreement with the defendant if it promises to recommend a particular disposition of the case, and then either fails to recommend that disposition or recommends a different one." *United States v. Heredia*, 768 F.3d 1220, 1231 (9th Cir. 2014). "The government's promise to recommend a particular disposition can be broken either explicitly or implicitly." *Id.* "The government is under no obligation to make an agreed-upon recommendation 'enthusiastically.' However, it may not superficially abide by its promise to recommend a particular sentence while also making statements that serve no practical purpose but to advocate for a harsher one." *Id.* (citations omitted). Thus, "the government breaches its bargain with the defendant if it purports to make the promised recommendation while 'winking at the district court' to impliedly request a different outcome." *Id.* (quoting *United States v. Has No Horses*, 261 F.3d 744, 750 (8th Cir. 2001)). "An implicit breach of the plea agreement occurs if, for example, the government agrees to recommend a sentence at the low end of the applicable Guidelines range, but then makes inflammatory comments about the defendant's past offenses that do not provide the

district judge with any new information or correct factual inaccuracies." *Heredia*, 768 F.3d at 1231 (citations omitted).

2. Analysis

Lawrence contends the government breached the provision of the Plea Agreement in which it recommended a § 5K1.1 downward departure when the government compared Lawrence's case unfavorably with other cases in the District of Oregon, described Lawrence's conduct as worse than that of other defendants in the district, and made other statements that contradicted its promise and obligation to argue for imposition of no more than 35 years' imprisonment.

Lawrence asserts defense counsel rendered ineffective assistance when he failed to object to AUSA Gabriel's statements during his sentencing presentation related to Lawrence that Lawrence's behavior "was just more heinous. It was more horrific" than cases in which sentences imposed for Murder in the First Degree were 30 years because "none of those cases involved prolonged torture," that "this case does seem to stand apart from the . . . other murder cases," that this case "is - at least in the last 14 years - the worst murder that has come to . . . federal jurisdiction," and that "the murder here of Faron Kalama was the worst, but it could be conditioned with [what] was arguably the worst or among the worst because of that McKinley murder, 13, 14 years ago." Def.'s Second Am. Mot. to Vacate, Ex.

209 at 82-84, 114. Specifically, Lawrence asserts defense counsel was ineffective when he failed to identify AUSA Gabriel's statements as a breach of the Plea Agreement.

Although AUSA Gabriel made various statements regarding the nature and/or severity of the crime to which Lawrence had pled guilty, he also moved for a downward departure pursuant to the terms of the Plea Agreement. In addition, AUSA Gabriel argued in favor of the government's recommendation when the Court expressed concern as to whether a downward departure was warranted. For example, USA Gabriel conceded the comparator cases in which individuals had received life imprisonment did not involve death, but he also pointed out that "[t]he criminal history of some of these defendants was much worse than the criminal history of these defendants." AUSA Gabriel also noted "with respect to the child exploitation cases . . . those cases addressed prolific child pornography producers, who were habitual offenders. And the social science does say that the recidivism rate for sex offenders such as that is so incredibly high, that they present a dangerousness." AUSA Gabriel sought to distinguish this case from other cases in which defendants had received life sentences. AUSA Gabriel also pointed out repeatedly to the Court that "defendants did provide substantial assistance, which relieves the Court from the obligation to impose life." When the Court asked the government

to explain "[w]hy . . . the sentence you're seeking [is] sufficient, given the seriousness of the criminal behavior at issue here," AUSA Gabriel defended the government's request for a downward departure based on the age of Lawrence; her difficult, traumatic, and violent relationships and childhood; her abuse; her mental illness; and her low IQ as factors that "may not have been present in the other cases that were presented to the Court for comparison." In short, AUSA Gabriel conceded the facts of the crime to which Lawrence had pled guilty were quite serious, but he also vigorously defended the government's recommendation for a downward departure consistent with the Plea Agreement. Thus, AUSA Gabriel's conduct is not the kind of conduct that courts have found breached plea agreements.

In *Alcala-Sanchez*, for example, the government "promised to recommend a total offense level of 12 and no more than a 33-month sentence and instead submitted a sentencing summary chart recommending a total offense level of 20 and a 78-month sentence." 666 F.3d at 575-76. The Ninth Circuit held the government breached the plea agreement and noted "[i]t does not matter that the breach was inadvertent, caused by a heavy workload for government lawyers, or the result of cases getting handed from person to person at the U.S. Attorney's Office." *Id.* at 576. Similarly, in *United States v. Luciano* the Ninth Circuit concluded the government breached the plea agreement when

> [u]nder the plain language of the plea agreement, if the government determined that [the defendant] had provided substantial assistance, it was obligated to move the court, pursuant to U.S.S.G. § 5K1.1, "to impose a sentence below the otherwise-applicable" Guidelines range of 6-12 months. Although it filed a section 5K1.1 motion asserting that [the defendant] had provided substantial assistance, the government recommended a 6-month sentence that was within, rather than below, the "otherwise applicable" Guidelines range.

765 F. App'x 350, 351 (9th Cir. 2019). In *Heredia* the Ninth Circuit concluded the government breached the plea agreement even though it abided by the letter of the agreement. The court explained:

> Here, the parties agreed to recommend that Morales receive a prison term equal to the low end of the applicable Guidelines range plus a three-year term of supervised release. The government breached its agreement, however, through its repeated and inflammatory references to Morales's criminal history in its sentencing memorandum. . . . [G]iven the opportunity to argue for the low-end sentence it had promised to recommend, the government offered a series of prejudicial "statements related to the seriousness of the defendant's prior record." *Whitney*, 673 F.3d at 971. The central theme of the government's sentencing position was that Morales was a dangerous recidivist who had spent twenty years flouting the law and menacing others. Whether intentional or not, the government breached the plea agreement by implicitly recommending a higher sentence than agreed upon.
>
> * * *
>
> Indeed, given the government's promise of leniency, it is notable that its sentencing memorandum contained no mitigating information at all. Rather, it emphasized that Morales, a "danger to the community," needed to be

> "deterre[d]" because of his "20-year criminal history," his "consistent disregard" for the law, and his criminal "propensity." The reader is left to wonder why the government believed a low-end Guidelines sentence was appropriate in the first place. Accordingly, we conclude that, as a whole and in context, the government's pejorative comments about Morales's criminal history and detailed descriptions of his prior offenses served "no purpose" but to argue for a harsher punishment than it had agreed to recommend. By implicitly advocating for a sentence other than the stipulated one, the government breached the plea agreement.

768 F.3d at 1232-34 (quotations omitted).

Here, in contrast, AUSA Gabriel's comments about the facts of this case and the nature of the charge were made in the context of addressing the Court's express concerns that a sentence less than a life sentence would be insufficient to achieve the goals of the sentencing guidelines. AUSA Gabriel, unlike the prosecutor in *Heredia*, did not make the promised recommendation "while winking at the district court' to impliedly request a different outcome." As noted, AUSA Gabriel acknowledged the Court's concerns about a sentence less than life and argued for a lesser sentence for Lawrence based on her cooperation, her history, her mental illness, her low IQ, and her particular situation. On this record, therefore, the Court concludes AUSA Gabriel did not implicitly or explicitly breach the Plea Agreement.

Accordingly, the Court concludes Lawrence's counsel did not provide ineffective assistance when they failed

to object to the government's alleged breach of the Plea Agreement.

C. Lawrence's Claim Based on Defense Counsel's Failure to Consider the Possibility that the Court Would Impose a Life Sentence

Lawrence asserts she received ineffective assistance of counsel at sentencing when defense counsel failed to consider the possibility that the Court would impose a life sentence.

Even if defense counsel's failure to appreciate fully that the Court could impose a life sentence despite the Plea Agreement fell below an objective standard of reasonableness, the Lawrence fails to establish prejudice. Lawrence does not identify the way in which counsel's fuller appreciation of the risk would have resulted in an alternative strategy at sentencing and would have created a reasonable probability that she would have received a lesser sentence. The Court fully appreciated at sentencing Lawrence's violent and difficult background and circumstances as well as her mental illness, low IQ, and significant assistance to the government when it decided on a life sentence. The Court also concluded the comparator cases were unhelpful, and, therefore, the Court did not consider them. In addition, the Court has already concluded AUSA Gabriel did not breach the Plea Agreement. Finally, even if the sentencing hearing had not been bifurcated, the Court would still have been deeply troubled by the facts of the crime and reached the same

conclusion that a sentence less than life would not achieve the goals of the sentencing guidelines. The Court, therefore, concludes Lawrence has not established that the result of the proceeding would have been different but for defense counsel's failure to consider the possibility that the Court would impose a life sentence.

Accordingly, the Court concludes Lawrence's counsel did not provide ineffective assistance when he failed to consider the possibility that the Court would impose a life sentence.

D. Lawrence's Claim Based on Counsel's Failure to Object to the Presentation and Use of Comparator Cases

Lawrence alleges she received ineffective assistance of counsel when counsel failed to object when the Court considered information beyond that contained in the record to sentence Lawrence. Specifically, Lawrence asserts counsel should have objected to the government's presentation of "partial sentencing information about other cases in the District of Oregon," objected to the "Court's separate request for sentencing materials from other cases in the District of Oregon," and objected to "the Court's reliance on its own memory and recollection of the details from other murder cases in the District of Oregon." Lawrence also asserts defense counsel provided ineffective assistance "[w]hen, at sentencing, the Court's statements made it plain that the Court considered defendants' conduct worse than that of others convicted of First

Degree Murder in the District of Oregon [and] defense counsel failed to move for a continuance on the basis that the defense had not had a fair or meaningful opportunity to understand, evaluate, and present information about those cases." The government asserts Lawrence's claim related to use of the various comparator cases is barred by the resolution of her direct appeal.

Generally a defendant may not relitigate in a § 2255 proceeding those issues that have been resolved on appeal. *See, e.g., United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985) (The defendant "also claims . . . he was denied effective assistance of counsel because his attorney failed to raise double jeopardy, due process, res judicata, and collateral estoppel challenges during his probation revocation hearing. Since these challenges [were raised and decided on appeal, they] would all have been meritless, [and, therefore, the defendant] cannot claim that his counsel's failure to raise them constituted ineffective assistance."); *United States v. Ramirez*, 327 F. App'x 751, 752 (9th Cir. 2009)(The defendant "is barred from using a § 2255 motion to relitigate issues decided on direct appeal.").

On appeal of Lawrence's case the Ninth Circuit dismissed Lawrence's claim that her "sentences were improperly influenced by consideration of other crimes committed in the District of Oregon" and explained:

> The [district] court . . . dismissed the other crimes that it considered as "not . . . reasonably comparable" to [Lawrence's] crime. It then explained that the need to impose a comparable sentence in this case was an "academic" issue that was "[not] a factor that really provide[d] any help" in determining the correct sentence. The consideration of other crimes thus appears to have played little if any role in the district court's sentencing decision.

United States v. Lawrence, 630 F. App'x 672, 675 (9th Cir. 2015). Thus, in this case, as in *Redd*, any challenge by defense counsel to the Court's use of comparator cases provided by the Probation Office, the government, or the Court's own memory would have been meritless because Lawrence's challenge to the use of comparator cases was raised and dismissed on appeal. The Court, therefore, concludes Lawrence cannot claim defense counsel's failure to object to the use of comparator cases constituted ineffective assistance of counsel. *See Ramirez*, 327 F. App'x at 752 ("Therefore, even assuming the failure of Ramirez's attorney to object to the admission of this testimony is deficient performance, Ramirez cannot show prejudice because the testimony was admissible.")(citing *Strickland*, 466 U.S. at 688)).

Accordingly, the Court concludes Lawrence's counsel did not provide ineffective assistance when they failed to object to the Court's consideration of information beyond that contained in the record when sentencing Lawrence.

E. Lawrence's Claim for Defense Counsel's Comparison of Lawrence's Case to Outcomes under Oregon Law

Lawrence asserts she received ineffective assistance of counsel when defense counsel "invited a comparison to [the outcome under] Oregon law in . . . Lawrence's sentencing submission and then pursued that comparison at sentencing." Even if defense counsel's comparison to Oregon law fell below an objective standard of reasonableness under prevailing professional norms, which is questionable, the Court finds Lawrence has not established prejudice.

At sentencing the government expressly argued comparisons to state law are irrelevant, and the Court agreed. Specifically, the Court noted:

> I don't think there's a lot to argue about in terms of the comparison between the ways in which this conduct could have been charged [in state and federal court]. The fact is [Lawrence] admitted responsibility for conduct that is Murder in the First Degree, and she got the Government to agree to open the door to the Court exercising discretion for something other than a mandatory life sentence. So I don't think this comparison [to state law] provides any help at all in trying to analyze, in the end, what is a reasonable sentence.

Def.'s Second Am. Mot. to Vacate, Ex. 209 at 120-21. Thus, the Court did not consider defense counsel's comparison to state law in sentencing. The Court, therefore, concludes Lawrence has not established "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Accordingly, the Court concludes Lawrence's counsel did

not provide ineffective assistance when he "invited a comparison to Oregon law in . . . Lawrence's sentencing submission and then pursued that comparison at sentencing" because the Court did not consider the state-law comparisons.

IV. Ineffective Assistance Claims Based on Appeal

Lawrence alleges she received ineffective assistance of counsel on appeal when appellate counsel "failed to assert . . . the sentence of life imprisonment was substantively unreasonable." Lawrence also asserts appellate counsel provided ineffective assistance when he failed to argue that "the government's breach of a plea agreement warranted remand for re-sentencing before a different judge" and that "the 'harmless error' rule did not apply to the law of contractual plea agreements" and "failed to petition the appellate court for reconsideration or en banc review after it" applied the harmless-error rule.

A. Lawrence's Claim that a Sentence of Life Imprisonment Was Substantively Unreasonable

Lawrence asserts she received ineffective assistance of counsel on appeal when counsel "failed to assert . . . the sentence of life imprisonment was substantively unreasonable." The Court concludes even if defense counsel's failure to assert on appeal that Lawrence's sentence was substantively unreasonable, Lawrence has not established prejudice.

The Ninth Circuit explained in *United States v. Fitch* that when "'determining substantive reasonableness, we are to consider the totality of the circumstances, including the degree of variance for a sentence imposed outside the Guidelines range.'" 659 F.3d 788, 798 (9th Cir. 2011)(quoting *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008)). "For a non-Guidelines sentence, we are to give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Fitch*, 659 F.3d at 798 (quotation omitted). "We may not reverse just because we think a different sentence is appropriate." *Id.* The Ninth Circuit "afford[s] significant deference to a district court's sentence under 18 U.S.C. § 3553 and reverse[s] only if the court applied an incorrect legal rule" or if the sentence was "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Martinez-Lopez*, 864 F.3d 1034, 1043 (9th Cir. 2017).

Lawrence concedes the Court "took note of [Lawrence's] mitigating life circumstances," but she asserts the Court "ultimately justified a life sentence based on the nature and circumstances of the conduct and the Court's perception that [Lawrence's] conduct was far worse than that of any other defendant sentences in the district for murder." Lawrence agrees the Court evaluated each of the § 3553 factors, and she does not

assert the Court failed to consider any mitigating circumstances. Instead Lawrence contends the Court should have balanced those factors differently. Thus, Lawrence has not established sufficient facts or cited any authority from which the Ninth Circuit could conclude Lawrence's sentence was "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." The Court, therefore, concludes Lawrence has not established she was prejudiced by defense counsel's failure to assert on appeal that the sentence of life imprisonment was substantively unreasonable.

Accordingly, the Court concludes Lawrence's counsel did not provide ineffective assistance when he "failed to assert . . . the sentence of life imprisonment was substantively unreasonable."

B. Lawrence's Claims Related to Failure to Assert Breach of the Plea Agreement and Use of the Harmless Error Rule

The Court has already concluded the government did not breach the Plea Agreement. The Court, therefore, also concludes Lawrence did not receive ineffective assistance of counsel on appeal when appellate counsel failed to argue the government's breach of a plea agreement warranted remand for resentencing before a different judge.

As to Lawrence's assertion that appellate counsel provided ineffective assistance on appeal when he failed to argue

that the "harmless-error" rule did not apply to the law of contractual plea agreements, the Ninth Circuit has made clear that it reviews the issue for plain error absent an objection to an alleged breach of the plea agreement at trial. *See, e.g., United States v. Hernandez-Castro*, 814 F.3d 1044, 1045 (9th Cir. 2016)(reviewing the defendant's claim that the government breached the plea agreement for plain error because the defendant "did not raise this argument at sentencing.")(citing *Puckett v. United States*, 556 U.S. 129, 135 (2009)); *United States v. Gonzalez-Aguilar*, 718 F.3d 1185, 1187 (9th Cir. 2013)(same). Lawrence, therefore, has failed to establish either that appellate counsel's performance fell below an objective standard of reasonableness under prevailing professional norms or that the result of the proceeding would have been different "but for" appellate counsel's errors.

Accordingly, the Court concludes Lawrence's counsel did not provide ineffective assistance when he failed to argue that "the government's breach of a plea agreement warranted remand for re-sentencing before a different judge," failed to argue that "the 'harmless error' rule did not apply to the law of contractual plea agreements," and/or "failed to petition the appellate court for reconsideration or en banc review after it" applied the harmless error rule.

V. Lawrence's Claim Related to Cumulative Errors

Finally, Lawrence asserts: "To the extent that this Court were to conclude that the constitutional deprivations viewed individually were harmless, not prejudicial, or otherwise not warranting relief, it must conclude that the cumulative effect of the multiplicity of errors (in any combination) does."

The Ninth Circuit has "'granted habeas relief under the cumulative effects doctrine when there is a 'unique symmetry' of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case.'" *Smith v. Pennywell*, 742 F. App'x 230, 232 (9th Cir. 2018)(quoting *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011)). Although Lawrence points to a number of alleged potential errors, the Court has concluded most of the items identified are not error or that Lawrence has not established prejudice. The Court, therefore, concludes Lawrence "has failed to establish a 'unique symmetry' of errors that amplify a key contested issue." *Smith*, 742 F. App'x at 232.

In summary, the Court denies Lawrence's Second Amended Motion to Vacate, Set Aside or Correct Sentence. In addition, the Court finds Lawrence has not made a substantial showing that she was denied a constitutional right, and, therefore, the Court declines to issue a Certificate of Appealability.

CONCLUSION

For these reasons, the Court **DENIES** Lawrence's Second Amended Motion (#281) Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by A Person in Federal Custody and **DECLINES** to issue a Certificate of Appealability.

IT IS SO ORDERED.

DATED this 16th day of August, 2019.

/s/ Anna J. Brown

ANNA J. BROWN
United States Senior District Judge